



Council of the
European Union

037433/EU XXVII.GP
Eingelangt am 29/10/20

Brussels, 29 October 2020
(OR. en)

12322/20

INF 182
API 117

NOTE

From: General Secretariat of the Council
To: Working Party on Information
Subject: Public access to documents
- Confirmatory application No 22/c/01/20

Delegations will find attached the:

- Letter sent to the General Secretariat of the Council on 16 September 2020 and registered as a request for access to documents on 8 October 2020 (Annex 1);
- reply from the General Secretariat of the Council dated 13 October 2020 (Annex 2);
- confirmatory application dated 26 October 2020 and registered on the same day (Annex 3).

[Letter sent to the General Secretariat of the Council on 16 September 2020 and subsequently also registered as a request for access to documents by the Information Services Unit / Transparency on 8 October 2020]

[REDACTED]

Council of the European Union
Rue de la Loi / Wetstraat, 175
B-1048 Bruxelles/Brussel
Belgique/België

Document sent by e-mail

Dear Sir / Madam,

On 27 July the Council adopted implementing Decision (EU) 2020/1117 appointing the European prosecutors of the EPPO which was published on July 29th. This decision constitutes an act that individually affects all those directly concerned by the appointment, nationals of the Member States that had applied to these positions, the regular and transparent inter-institutional functioning of the Council and the European Parliament and the independence of the EPPO.

The decision

1

The decision states that the Council followed the order of preference indicated by the selection committee for the candidates nominated by Czechia, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Romania, Slovenia, Slovakia and Finland.

By contrast, the Council did not follow the order of preference of the selection committee as regards the candidates designated by Belgium, Bulgaria and Portugal, but simply stated as the basis for this option "(...) *a different assessment of the candidates' merits, carried out in the relevant Council preparatory bodies (...)*". No reasons are provided in the Decision.

[REDACTED]

Council's decision breaches of EU law

I, [REDACTED] was the [REDACTED] candidate who was ranked first by the selection committee. This preference was not followed by the Council without any reasons being provided for that.

I have tried to obtain information from the Council in order to inquiry as to the actual reasons for the Council Decision not to follow the order of preference of the selection committee. I have had no success in obtaining this information, as all documents that might be considered relevant for this purpose have been classified EU RESTRICTED, making this decision completely opaque as to its real grounds.

It is my view, that, as regards the candidates where it has failed to follow the order of preference of the selection committee, calling for a different assessment of the candidates' merits, without any statement of reasons, the Council has incurred in maladministration and has, notably, infringed:

2

- Council Decision (EU) 2018/1275 of 18 September 2018 appointing the members of the selection board provided for in Article 14(3) of Regulation (EU) 2017/1939;
- Council Decision (EU) 2018/1696 of 13 July 2018 on the internal rules of the selection committee;
- The principle of the independence of the European Public Prosecutor's Office explicitly enshrined in Article 6 of Regulation (EU) 2017/1939.
- The principle of transparency has foreseen in Article 15 TFEU.
- The right to good administration enshrined in Article 41 of the Charter of Fundamental Rights, in particular the obligation imposed on the administration to give reasons for its decisions.



Council's decision breaches EPPO's independence which is guaranteed by its selection process

EPPO emerges as a solution to the weak response by Member States in combating fraud affecting the EU's financial interests and corrupt behaviour in this area. A policy of proximity, transparency and accountability, accompanied by a culture of zero tolerance of any attempt to create obstacles to the independent exercise of judiciary functions, is fundamental to confirm confidence in EPPO's mission and strengthening the mechanisms of the rule of law, essential prerequisite for sound and efficient management of the Union's financial resources.

The independence of the EPPO is first guaranteed through an impartial, independent selection process of the European Prosecutors, guided by criteria of fairness and choices according to the candidates' competence and the guarantee of their independence for the functions they will perform. Under Article 16 of the Regulation Member States are only to nominate three candidates to the position (without any order of preference) with the selection and appointment to be done by the Council (emphasis added).

3

The independence of the selection process is further ensured by foreseeing in Article 14. n.3 an European independent selection committee and the Council adoption of the rules according to which the role of this committee in the selection process will be carried out. These rules have been laid out in Council Decision (EU) 2018/1275 of 18 September 2018 and Council Implementing Decision (EU) 2018/1696 of 13 July 2018.

The role and operating rules of the selection committee also aim to ensure independence and impartiality in the selection process as a way of ensuring the independence of the EPPO itself. In particular, the operating rules of the committee



adopted in Council Implementing Decision (EU) 2018/1696 expressly foresee that the selection committee will provide reasons for its selection (what it has done) and that it *"shall rank the candidates according to their qualifications and experience. The ranking shall indicate the selection panel's order of preference and shall not be binding on the Council."*

To guarantee its independence, it was ensured that the selection committee was composed of 12 persons, assuring geographical and gender balance, chosen from among former members of the Court of Justice and the Court of Auditors, members of Eurojust, members of national supreme courts, senior prosecutors and lawyers of recognised competence. One of the members of such committee is chosen by the European Parliament. While the European Parliament, contrary to the case of the European Chief Prosecutor, does not have a joint power of appointment in the case of European prosecutors, it does participate in the process by its role in the appointment of the selection committee. The role of the Parliament in guaranteeing the independence of the EPPO is therefore, in the case of the European prosecutors, dependent on protecting the role of the committee and the possibility for Parliament to scrutinize the selection criteria used by the Council, in particular when diverging from the selection proposed by the committee.

4

The limits of the Council's discretionary power

The selection and appointment of the European Public Prosecutor to be made by the Council, may differ from the ranking made by the selection committee. But when this happens, the Council has a special obligation to explain the reasons for why it has decided to diverge from the selection order proposed by the committee. In the absence of these reasons a shadow is cast over the selection made by the Council, diminishing the trust of European citizens on the independence on the EPPO.



The lack of such reasons is, in itself, a decision that affects the fundamental right to good administration of the EU citizen, that accepted to participate in such process, trusting on the fairness and impartiality of the procedures set up by the Council.

One could expect for the Council not to be obliged to provide additional reasons when endorsing the choices of (and reasons provide by) the selection committee. Instead, when the Council does not endorse the choices of the selection committee, it needs itself to at least provide reasons for why it has decided otherwise. This is also necessary to respect the role attributed to the selection committee and the public trust in the selection process that is instrumental to the independence of the European prosecutors themselves.

The absence of reasons and lack of transparency make it impossible to even establish if the Council has indeed exercised its power (that is also an obligation) to effectively select the candidates instead of simply appointing the candidates preferred by national governments.

5

The request

I, the undersigned demand that the Council redress this situation that affects my personal rights, the public interest of EPPO's independence and the regular and transparent inter-institutional functioning of the Council:

- A) Making public the proceedings of the selection and the reasons why the Council has not followed the selection committee order of preference** (including if it has instead followed an order of preference given by national governments).



B) Annuling the unlawful appointment of the second ranked candidate

[REDACTED], as a matter of urgency,
considering the breaches of EU law committed by the Council,
aforementioned, notably,

- Council Decision (EU) 2018/1275 of 18 September 2018 appointing the members of the selection board provided for in Article 14(3) of Regulation (EU) 2017/1939;
- Council Decision (EU) 2018/1696 of 13 July 2018 on the internal rules of the selection committee;
- The principle of the independence of the European Public Prosecutor's Office explicitly enshrined in Article 6 of Regulation (EU) 2017/1939.
- The principle of transparency has foreseen in Article 15 TFEU.
- The right to good administration enshrined in Article 41 of the Charter of Fundamental Rights, in particular the obligation imposed on the administration to give reasons for its decisions.

6

Yours sincerely,

Cc:

- [REDACTED]
[REDACTED]@consilium.europa.eu
- [REDACTED]
[REDACTED]@consilium.europa.eu
- [REDACTED];
[REDACTED]@consilium.europa.eu

- [REDACTED]
[REDACTED] [@europarl.europa.eu](mailto:[REDACTED]@europarl.europa.eu)
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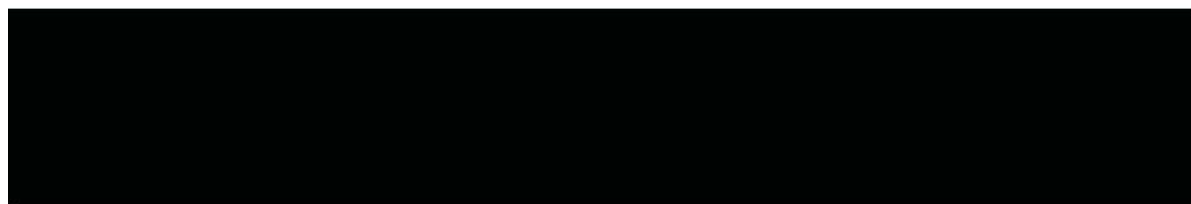
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- [REDACTED]
[REDACTED]@europarl.europa.eu





Council of the European Union
General Secretariat
Directorate-General Communication and Information - COMM
Directorate Information and Outreach
Information Services Unit / Transparency
Head of Unit

Brussels, 13 October 2020

DELETED
Email: **DELETED**

Ref. 20/1823-rh/mf

Request made on: 16.09.2020
Registered on: 08.10.2020

Dear **DELETED**,

On 16 September 2020, you have complained against Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors and you have requested the Council to make public the proceedings of the selection procedure and, in particular the reasons why the Council has not followed the selection committee order of preference.

By letter of the Council of 8 October 2020, you have received information on the reasons which underpinned the aforementioned Council implementing decision and you were informed that several documents – to the extent that they concern your personal data and assessment of your merits – can be made available to you at your request.

By this letter, you have also been informed that your request, in so far as it purports to making public documents concerning the proceedings of the selection procedure, would be analysed as a request for public access to documents under Regulation (EC) No 1049/2001¹ and that you would receive a separate reply in that regard.

Following the letter of 8 October 2020, please note that we have identified the following documents as corresponding to your request:

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43)

9907/19 of 6 June 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation **2017/1939** on the candidates nominated by Austria.

10530/19 of 21 June 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation **2017/1939** on the candidates nominated by Belgium, Germany, France and the Netherlands.

13105/19 of 15 October 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation **2017/1939** on the candidates nominated by Cyprus, Greece, Lithuania and Romania.

14188/19 of 19 November 2019 - Selection procedure of one of the candidates nominated by Cyprus for the post of European Prosecutor.

14273/19 of 19 November 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation **2017/1939** on the candidates nominated by Spain, Croatia, Luxembourg, Portugal and Slovenia.

14775/19 of 6 December 2019 - JHA Counsellors (COPEN).

14780/19 INIT of 6 December 2019 - EPPO: appointment of the European Prosecutors - Letter to one nominated candidate of Cyprus.

14780/19 REV 1 of 12 December 2019 - EPPO: appointment of the European Prosecutors - Letter to one nominated candidate of Cyprus.

14780/19 REV 2 of 19 December 2019 - EPPO: appointment of the European Prosecutors - Letter to one nominated candidate of Cyprus.

14822/19 of 10 December 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation **2017/1939** on the candidates nominated by Italy, Estonia and Slovenia.

6694/20 of 9 March 2020 - EPPO: appointment of the European Prosecutors - Written remarks from Portugal and Belgium on the ranking and reasoned opinion on the candidates nominated by them.

8480/20 of 2 June 2020 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation **2017/1939** on the candidates nominated by Malta.

9019/20 of 24 June 2020 - Letter concerning one nominated candidate of Bulgaria for the position of European Prosecutor.

9020/20 of 24 June 2020 - Draft letter concerning one nominated candidate of Bulgaria for the position of European prosecutor.

9316/20 of 2 July 2020 - EPPO: Process for appointment of the European Prosecutors - Letters in relation to nominated candidates for the position of European Prosecutors.

9348/20 of 2 July 2020 - EPPO: appointment of European Prosecutors - Written remarks from Bulgaria on the ranking and reasoned opinion on the candidates nominated by it.

9638/20 of 14 July 2020 - Summary of discussions of the meeting JHA Counsellors COPEN - EPPO 1 July 2020.

9669/20 of 16 July 2020 - EPPO: Process for the appointment of the European Prosecutors - Letter from the Minister of Justice, Equality and Governance of Malta to the EPPO selection panel.

9670/20 INIT of 16 July 2020 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Malta.

9670/20 REV 1 of 17 July 2020 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Malta.

9851/20 of 24 July 2020 - Summary of proceedings of the JHA Counsellors (EPPO) meeting on 22 July 2020.

11199/20 of 29 September 2020 - EPPO: Process for the appointment of the European Prosecutors - Notifications to the unsuccessful candidates for the post of European Prosecutor

By the present, I regret to inform you that the General Secretariat of the Council is unable to make the requested documents public, in the sense of a disclosure with an *erga omnes* effect, allowing any person to have access to the documents in question.

First, the requested documents, which comprise *inter alia* an assessment of the candidate's legal expertise, professional experience and ability to perform the duties of European Prosecutor, contain personal data of the candidates for the appointment of the European Prosecutors. Therefore they fall within the scope of the exception relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001). The notion of personal data is interpreted broadly in the case-law of the Court. It manifestly covers both the factual elements concerning the candidates' professional experience and qualifications and the selection panel's individual as well as comparative assessment of the candidate's merits.

According to established case law, where a request seeks to obtain access to a document including personal data, the legal framework on the protection of individuals with regard to the processing of personal data by the European institutions and bodies becomes applicable in its entirety.

More specifically, according to Article 9 of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, *"personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if:*

(a) the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient; or

(b) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

(...) Union institutions and bodies shall reconcile the right to the protection of personal data with the right of access to documents in accordance with Union law".

In your complaint you have not established the necessity of the transfer of the personal data contained in the requested documents.

Second, the Council considers that disclosure of the requested documents is likely to cause harm to the reputation of the candidates and therefore would prejudice their legitimate interests.

In particular, the disclosure of the information contained in the documents sought for public release, such as the assessment of the candidates' merits or the comparative assessment of merits of various candidates, could be relevant for any other position both in the public or the private sector for which the candidate could be considered in the future since it shows the capabilities of the candidate as legal professional.

As such, it could have a significant negative impact on the candidates' career prospects and in particular their chances to succeed in other competitions.

Inevitably, this risk is even higher where disclosure relates to an opinion on the appointment of a candidate that is unfavourable or could be interpreted as such.

It follows that the disclosure of the requested documents is likely to undermine the protection of the candidates' commercial interests (Article 4(2), first indent of Regulation (EC) No 1049/2001), in the event that they carry out or intend to carry out paid work after the selection procedure is over or after their term as European Prosecutor has finished.

Under these circumstances, the GSC is unable to grant public access to the parts of the requested documents revealing background data for assessing the suitability of the candidates to perform the duties as European Prosecutor.

Third, the GSC considers that full disclosure of the requested documents, and especially of information concerning the candidates' suitability to perform the duties of European Prosecutor, would seriously undermine the aims and quality of the selection and appointment procedures provided for in Articles 14 to 16 of the EPPO Regulation. It follows that your request to access those documents has to be refused on the basis of Article 4(3) of Regulation (EC) No 1049/2001.

The selection procedures for the post of European Prosecutor are very specific in nature. They include several distinct stages, starting with a selection procedure organised by the authorities of each of the interested Member States (Article 16(1) of the EPPO Regulation), an assessment by an independent panel set up in accordance with Article 14(3) of the EPPO Regulation and a final assessment on the basis of the documents brought to the attention of the Council by the interested Member States and the selection panel itself, leading to the adoption of a Council decision on the appointment (Article 16(3) of the EPPO Regulation).

In the light of that particular nature of those procedures, the publication of the selection panels' opinions, rankings and other documents in relation to the deliberations in the Council and its preparatory bodies would directly affect the confidential nature of the deliberations of the selection panel, as expressly foreseen in Rule IV of the operating rules of the selection panel². It would also undermine the secrecy of deliberations of the Council and its various preparatory bodies involved in the assessment of the candidatures, provided for in Article 6(1) of the Council Rules of Procedure. Moreover, public access to documents produced on different stages of that process by different stakeholders would undermine the proper conduct of those procedures.

On the one hand, disclosure of the requested documents would inevitably affect working methods of the Member States and of the selection panel in any future selection procedures. Inevitably, it would make the Member States and the Panel be more restrained and guarded when giving the reasons for their assessment. That, over a time could lead to the situation that the Council would not be able to obtain complete, relevant and useful explanation of the rationale for those assessments, whether favourable or unfavourable.

On the other hand, the disclosure of those documents is also likely to have a negative impact on the potential candidates interested to apply in the future for the post of European Prosecutor. Such disclosure might also dissuade certain even highly qualified individuals from applying in the future because, even if the assessment of their merits were favourable, the documents produced in the course of the procedure contain detailed comments on the abilities of the candidates, some of whom might fear a negative impact on their reputation.

It follows that the disclosure of the documents sought could have broader systemic implications for the correct functioning of selection procedures for European Prosecutors.

Fourth, having examined the context in which the requested document were drafted, on balance the General Secretariat of the Council could not identify any evidence suggesting the existence of an overriding public interest in their disclosure.

² Council Implementing Decision (EU) 2018/1696 of 13 July 2018 on the operating rules of the selection panel provided for in Article 14(3) of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 282, 12.11.2018, p. 8–12).

Finally, the General Secretariat of the Council has also examined the possibility of releasing parts of the documents.³ However, since it has been established that the abovementioned exceptions to the right of access apply to their entire content, the General Secretariat of the Council is obliged to refuse even a partial access.

Pursuant to Article 7(2) of Regulation (EC) No 1049/2001, you may ask the Council to review this decision within 15 working days of receiving this reply. Should you see the need for such a review, you are invited to indicate the reasons thereof.⁴

Yours sincerely,

Fernando FLORINDO

³ Article 4(6) of Regulation (EC) No 1049/2001.

⁴ Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EU) No 2018/1725, if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.

[Letter and email sent to access@consilium.europa.eu on 26 October - 13:15]

From: **DELETED**

Sent: Monday, October 26, 2020 1:15 PM

To: TRANSPARENCY Access to documents (COMM) <Access@consilium.europa.eu>

Cc: **DELETED** @consilium.europa.eu>; **DELETED** @consilium.europa.eu>; **DELETED** @consilium.europa.eu>

Subject: Confirmatory Application Ref. 20/1823-rh/mf

Importance: High

Dear Sir / Madam

Council of the European Union,

Your Ref. 20/1823-rh/mf (13.10.2020)

Please pass the attached document – Confirmatory Application – to the person in charge of reviewing confirmatory applications.

Best regards,

DELETED

Confirmatory application according to Article 7 (2) of Regulation (EC) N° 1049/2001 of the European Parliament and of the Council, of 30 May 2001, regarding public access to European Parliament, Council and Commission documents

Sent by mail and registered letter with acknowledgement of receipt

Your Ref. 20/1823-rh/mf (13.10.2020)

Lisbon, 26 October 2020

Dear Sir / Madam

Council of the European Union

This confirmatory application concerns **prior** request to access to the following documents:

1

- 12175-2019 Appointment of European Prosecutors – Internal process to be followed within the Council
- 14273-2019 Opinion of the selection panel set up pursuant article 14(3) of Council regulation 2017/1939 on the candidates nominated by Spain, Croatia, Luxembourg, Portugal and Slovenia
- 6694-2020 EPPO: appointment of European prosecutors – Written remarks from Portugal and Belgium on the ranking and reasoned opinion of the candidates nominated by them
- 9628-2020: EPPO: Council implementing decision appointing European Prosecutors of the European Prosecutors' Office

JHA Counsellors meetings:



- 26.11.2019 CM 4844/19;
- 12.12.2019 CM 5066/20;
- 01.07.2020 CM 277/20;
- 20.07.2020 CM 3085/1/20;
- 22.07.2020CM 3153/1/20.

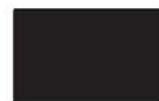
The aforementioned request to access to documents relates to Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors, as referred in your reply dated 13.10.2020, denying access to those documents.

In brief, the arguments referred by the Council to deny access the aforementioned documents, as stated in the letter referred, are as follows:

1. The Council has identified the following documents as corresponding to my request:

2

- **9907/19** of 6 June 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Austria.
- **10530/19** of 21 June 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Belgium, Germany, France and the Netherlands.
- **13105/19** of 15 October 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Cyprus, Greece, Lithuania and Romania.
- **14188/19** of 19 November 2019 - Selection procedure of one of the candidates nominated by Cyprus for the post of European Prosecutor.
- **14273/19** of 19 November 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Spain, Croatia, Luxembourg, Portugal and Slovenia.



- **14775/19** of 6 December 2019 - JHA Counsellors (COPEN).
- **14780/19 INIT** of 6 December 2019 - EPPO: appointment of the European Prosecutors - Letter to one nominated candidate of Cyprus.
- **14780/19 REV 1** of 12 December 2019 - EPPO: appointment of the European Prosecutors - Letter to one nominated candidate of Cyprus.
- **14780/19 REV 2** of 19 December 2019 - EPPO: appointment of the European Prosecutors - Letter to one nominated candidate of Cyprus.
- **14822/19** of 10 December 2019 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Italy, Estonia and Slovenia.
- **6694/20** of 9 March 2020 - EPPO: appointment of the European Prosecutors - Written remarks from Portugal and Belgium on the ranking and reasoned opinion on the candidates nominated by them.
- **8480/20** of 2 June 2020 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Malta.
- **9019/20** of 24 June 2020 - Letter concerning one nominated candidate of Bulgaria for the position of European Prosecutor.
- **9020/20** of 24 June 2020 - Draft letter concerning one nominated candidate of Bulgaria for the position of European prosecutor.
- **9316/20** of 2 July 2020 - EPPO: Process for appointment of the European Prosecutors - Letters in relation to nominated candidates for the position of European Prosecutors.
- **9348/20** of 2 July 2020 - EPPO: appointment of European Prosecutors - Written remarks from Bulgaria on the ranking and reasoned opinion on the candidates nominated by it.
- **9638/20** of 14 July 2020 - Summary of discussions of the meeting JHA Counsellors COPEN - EPPO 1 July 2020.
- **9669/20** of 16 July 2020 - EPPO: Process for the appointment of the European Prosecutors - Letter from the Minister of Justice, Equality and Governance of Malta to the EPPO selection panel.

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- **9670/20 INIT** of 16 July 2020 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Malta.
 - **9670/20 REV 1** of 17 July 2020 - Opinion of the selection panel set up pursuant to Article 14(3) of Council Regulation 2017/1939 on the candidates nominated by Malta.
 - **9851/20** of 24 July 2020 - Summary of proceedings of the JHA Counsellors (EPPO) meeting on 22 July 2020.
 - **11199/20** of 29 September 2020 - EPPO: Process for the appointment of the European Prosecutors - Notifications to the unsuccessful candidates for the post of European Prosecutor
2. The General Secretariat of the Council claims that in my complaint I have not established the necessity of the transfer of the personal data contained in the requested documents, claiming this argument is decisive because of the following arguments:
- a. The requested documents contain personal data of the candidates for the appointment of the European Prosecutors, falling within the scope of the exception relating to the protection of the public interest as regards privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001).
 - i. Personal data covers information concerning the candidates professional experience and qualifications and the selection panel's comparative assessment of the candidate's merits.
 - ii. Article 9 of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons, states that "personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if:

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(a) the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the recipient; or

(b) the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests.

3. The General Secretariat of the Council considers that disclosure of the requested documents is likely to cause harm to the reputation of the candidates and prejudice their legitimate interests, giving the example of any other position both in the public or the private sector for which the candidate could be considering applying and concludes that it could have a significant negative impact on the candidates' career prospects and in particular their chances to succeed in other competitions. Adds that the disclosure of the requested documents is likely to undermine the protection of the candidates' commercial interests (Article 4(2), first indent of Regulation (EC) No 1049/2001), in the event that they carry out or intend to carry out paid work after the selection procedure is over or after their term as European Prosecutor has finished.

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4. The General Secretariat of the Council considers that full disclosure of the requested documents, especially of information concerning the candidates' suitability to perform the duties of European Prosecutor, would seriously undermine the aims and quality of the selection and appointment procedures provided for in Articles 14 to 16 of the EPPO Regulation.

a. This is so, because the publication of the selection panels' opinions, rankings and other documents in relation to the deliberations in the Council and its preparatory bodies would directly affect the confidential



nature of the deliberations of the selection panel, as expressly foreseen in Rule IV of the operating rules of the selection panel.

- b. Documents disclosure would affect working methods of the Member States and of the selection panel in any future selection procedures and possible candidates.
 - c. Concluding by stating that the disclosure of the documents sought could have broader systemic implications for the correct functioning of selection procedures for European Prosecutors.
5. The General Secretariat of the Council could not identify any evidence suggesting the existence of an overriding public interest in the disclosure of the requested document.
6. Concerning the possibility of releasing parts of the document, the General Secretariat of the Council decided to refuse it on the bases of considering that it had been established that the abovementioned exceptions to the right of access apply to their entire content.

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My Reply

1.1 Concerning the documents identified by the General Secretariat of the Council:

As can easily be assessed by a simple comparison between the documents referred to in the Council's letter, now challenged, and those that I have prior listed as being all documents relating to the matter in question, ¹ there are several documents concerning Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors that the General Secretariat of the Council deliberately omitted in its reply letter regarding access to documents.

Those documents are, among others:

¹ which the letter in reference clearly exposes being aware of and whose content is perceptible by the description that is made of such documents on the Council's site



- **12175-2019** Appointment of European Prosecutors – Internal process to be followed within the Council
- **9628-2020** EPPO: Council implementing decision appointing European Prosecutors of the European Prosecutors' Office

JHA Counsellors meetings:

- 26.11.2019 CM 4844/19: Consideration of the ranking and reasoned opinions of the nominated candidates of 18 participating Member States - **ST 14273 2019 INIT** RESTREINT EU/EU RESTRICTED on Portugal

The General Secretariat of the Council cannot fail to know the existence of such documents. To omit its reference in the reply letter is not only highly questionable, from a fairness perspective, but also demonstrates a biased procedure and a clear will to deliberately omit information that is decisive for my defence regarding Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors.

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That not only violates basic rules of good institutional functioning and transparency in Council's relationships towards citizens, but constitutes a step forward to the level of obstruction of the exercise of the rights of defence of a citizen to whom, among others, its own decisions is addressed.

I cannot fully exercise my right of defence and clarify all issues I wish to raise against the aforementioned Council's decision, of which the General Secretariat of the Council was well aware when replying to my request for access to documents, if I am not granted the basic right of access to the documents on which the decision-making process was based.

What motivates my defence is not strictly a personal choice for a post, but the choice of a European Prosecutor to whom has to be guaranteed an absolutely independent selection and appointment procedure, as that is the way to guarantee the independence of the EPPO, itself, from the outset.



It is therefore absolutely unquestionable that much more than a particular interest, what is at stake is a clearly public interest which the Council itself should have safeguarded, but, having failed to do so, I propose to do it myself in a civic exercise from which I will not resign.

2.1 Concerning the General Secretariat of the Council arguments related to the necessity of transfer of the personal data contained in the requested documents:

There is no grounds for such claiming, that once again is only a twist way to deny the access to documents.

Firstly, it is not accurate to say that I have not demonstrated the need for the data contained in the documents to which I have requested access, nor that I have not specified that access to such documents is in the public interest. On the contrary, I have clearly stated that access to such documents was and still is the only way to fully exercise defence rights in relation to Council's decision, challenged for breaching principles of transparency and proper functioning of the institutions and above all the EPPO's independence, principles all of which are clearly public in nature and, when weighing up the interests referred to in the aforementioned Article 9 of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons, should prevail.

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On the other hand, the disclosure of the documents in question can always be made with the safeguarding of personal data considered absolutely forbidden and whose knowledge does not contribute to the composition of the public interests under discussion, which can be done without any difficulty. This is, in fact, a recurring practice of the institutions.

The General Secretariat of the Council's argument in this segment is absolutely conclusive and is merely a biased excuse to, once again, obstruct access to documents that is well aware of being decisive for the knowledge of what actually



happened around the decision-making process under assessment and that is the real reason why it does not want to release them.

As far as data protection is concerned, it should be noted that the Minister of Justice of the Portuguese government, also part of the decision-making process in question, has not spared herself, in written form as well as in oral statements and in various forums, the last of which in the Portuguese Parliament, of making express references to the various candidates to the selection process here in question, mentioning their professional experience and characteristics, including personal data mentions, those that the Council feels it has to protect, namely under the data protection law. This demonstrates how clearly incongruous and unnecessary the Council's argument is, in this regard.

3.1 The General Secretariat of the Council considers that disclosure of the requested documents is likely to cause harm to the reputation of the candidates and prejudice their legitimate interests and undermine the protection of the candidates' commercial interests (Article 4(2), first indent of Regulation (EC) No 1049/2001).

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Firstly, it must be kept in mind that when candidates applied, they were well aware of the public nature of the selection procedure and that, therefore, it would end up being publicly scrutinised.

On the other hand, they were applying for the exercise of a public function, so they had to be willing to see their person publicly exposed and scrutinised in relation to the exercise of their public function and even to the assessment of their competence relating to the exercise of such public functions.

The recipients of public functions have the right to know the competencies of those who claim to have them for the exercise of the functions intended to make decisions that directly affect them.



Access to documents was requested only to those related to a public selection procedure and concerning the exercise of functions of a public nature, nothing related to the reserved private life of candidates.

Above references concerning personal interests and candidates' commercial interests, under provision of (Article 4(2), of Regulation (EC) No 1049/2001) have no rationale in this context and cannot prevail before the public interest that complies with the principles of transparency, foreseen in Article 15 TFEU, the right of good administration enshrined in Article 41 of the Charter of the Fundamental Rights and independence of the EPPO, explicitly enshrined in Article 6 of Regulation (EU) 2017/1939, reasons recurrently mentioned above.

4.1 The General Secretariat of the Council considers that full disclosure of the requested documents, especially of information concerning the candidates' suitability to perform the duties of European Prosecutor, would seriously undermine the aims and quality of the selection and appointment procedures provided for in Articles 14 to 16 of the EPPO Regulation.

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The same considerations referred in the previous point are valid here.

It can be understandable, that during the decision-making process, there would be a confidentiality limitation. But secrecy can never be opposed to the defence of the rights of those affected by such decisions, under risk of authoritarianism.

If decisions taken in secret are in no way accountable, namely by access to documents that can provide it, those who take them are left free for law violations, without any possibility of control over the decision-making process itself, because the accountability would be compromised and completely shielded by the secrecy of the classification of restricted access to documents made by the same author of the decision-making process.

Contrary to what the General Secretariat of the Council states, what can cause a systemic malfunction of the European Prosecutors' Selection Committee is the



maintenance of decisions that cannot be accountable, shielding accountability by a classification of restricted access to documents.

5.1 The General Secretariat of the Council refers that could not identify any evidence suggesting the existence of an overriding public interest in the disclosure of the requested document.

This argument is strongly refuted in the previous points, so it is unnecessary to repeat arguments here.

The request is based on the defence of the principles of transparency, has foreseen in Article 15 TFEU, the right of good administration enshrined in Article 41 of the Charter of the Fundamental Rights and independence of the EPPO, explicitly enshrined in Article 6 of Regulation (EU) 2017/1939. If this is not preponderance of the public interest I do not understand what the General Secretariat of the Council could consider to be.

The General Secretariat of the Council is making a legal interpretation of Regulation (EC) No 1049/2001, oriented to the defence of the Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors and, well aware that the request to access to documents is intimately related to it: manipulates the interpretation of Regulation (EC) No 1049/2001, obstructs the exercise of rights of defence that would clarify the very functioning of the Council's decision-making process and its lack of transparency, what obviously goes beyond the individual interest of the applicant and has absolute public repercussions.

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6.1 Concerning the possibility of releasing parts of the document, the General Secretariat of the Council decided to refuse it on the bases of considering that it had been established that the abovementioned exceptions to the right of access apply to their entire content.

This argument is meaningless. If this reasons were valid, the General Secretariat of the Council could then always refuse access to all documents. Of course, documents are always total pieces and considered as a whole, which does not mean that they



cannot be partially addressed with regard to the disclosure of their contents. This is what is even done with documents classified with higher security levels and related to internal security matters or covered by different types of secrets. This is, therefore, an obviously fallacious argument, intended to cover the decision previously taken, of not granting access to the documents in question, sanctioning Council strategy of making it impossible to exercise the rights of defence of the applicant in relation to the Council Implementing Decision (EU) 2020/1117 of 27 July 2020 appointing the European Prosecutors.

To conclude:

The documents here identified are available to the Council of the European Union, since they were drawn up by the latter and others were received by it and are in its possession, are related to the field of its activity, the applicant has an interest in them which has already been reasoned and are of intrinsic public nature and interest, since they relate to the procedure for recruitment to the post of European Public Prosecutor and have an impact on the principles of transparency, foreseen in Article 15 TFEU, the right of good administration enshrined in Article 41 of the Charter of the Fundamental Rights and independence of the EPPO, explicitly enshrined in Article 6 of Regulation (EU) 2017/1939.

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On 29 July 2020 the Council's implementing decision (EU) 2020/1117 of 27 July 2020 appointing the European Public Prosecutors' Office was published in the Official Journal of the European Union.

Such a decision constitutes a legislative act affecting not only those directly concerned by the appointment but also third parties.

The Council's decision expressly states that it has taken into account:

- a) "(...) Assessed the respective merits of the candidates taking into account the reasoned opinions submitted by the selection panel. (...)"
- b) "(...) The selection panel drew up the reasoned opinions and the ranking for each of the nominated candidates who fulfilled the conditions (...) and submitted them



to the Council, which received them on 29 May, 20 June, 11 October, 18 November and 10 December 2019, and on 16 July 2020 (...)".

- c) "*(...) As regards the candidates nominated by Belgium, Bulgaria and Portugal, the Council did not follow the non-binding order of preference of the selection panel, on the basis of a different assessment of the merits of those candidates which was carried out in the relevant preparatory bodies of the Council (...)"*.

To understand why the Council did not follow the order of preference of the candidates indicated by the selection committee in the aforementioned cases, is absolutely crucial to access to the above identified documents, held by the Council of the European Union.

It is not possible to understand the Council's decision in question or to assess its conformity in the light of the Treaties in order to consider the need for a possible judicial reaction aimed at restoring infringed rules, without having access to the identified documents, since the Council has had decisive recourse to all of them in its decision-making process, as is unquestionably clear from the text of the decision identified.

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The applicant has a right of access to these documents, in accordance with Article 2(1) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001

There is no situation which, in accordance with Article 4 of the Regulation, would justify refusal of access to those documents.

In stake is a public procedure for the appointment of the European Prosecutor, and the public interest in disclosure of the terms of the entire procedure should prevail with a view to public evaluation of its integrity and transparency, at most relevance in view of the fact that the appointment of the European Public Prosecutor's Office should be completely independent, as clearly stated in Article 6 of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation for the establishment of the European Public Prosecutor's Office.



In accordance with the procedure laid down in Article 7 (2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001, I request the General Secretariat of the Council to reconsider its position of refusal to access to aforementioned documents and decide to release them, since such access depends on the exercise of further rights, which presupposes the expiry of time limits.

The Applicant,

